APPENDIX

OPINION AND ORDER OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed March 17, 1981)

No. 79-3520

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IRIS CARTER,
Plaintiff-Appellant,

v.

DAYTON BOARD OF EDUCATION and JOHN E. MAXWELL, Superintendent,
Defendants-Appellees.

ORDER

BEFORE: WEICK and ENGEL, *Circuit Judges;* and BOYLE,* *District Judge.*

Plaintiff Iris Carter, a white female, employed by the Dayton Board of Education since 1965, appeals a judgment of dismissal of her suit brought in the district court claiming that she was sexually discriminated against by the Dayton Board of Education's failure to promote her to the position of elementary school principal in 1974 and subsequent years. Following an extensive trial before a magistrate, numerous findings of fact and conclusions of

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*The Honorable Patricia J. Boyle, United States District Judge for the Eastern District of Michigan, sitting by designation.

law were issued. These, in turn, were adopted by the district judge and became the basis for the judgment in favor of the defendants, from which this appeal is taken.

At the outset, plaintiff alleges that the district court erred in dismissing her claim for relief under Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, *et seq.* (1976). Our circuit, however, has clearly ruled that Title IX applies only to students involved in programs or activities receiving federal financial assistance and does not create an implied right of action for sex discrimination on the part of the employees of educational institutions receiving such assistance. *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir. 1979). The emphasis that Ms. Carter places upon the greater amount of federal financing received by the Dayton school system in comparison with that present in *Romeo Community Schools*, and upon the fact that these federal monies went into the school system's general fund, does not provide an adequate basis for the court to depart from that decision.

With respect to her claim brought under Title VII of the Civil Rights Act, plaintiff Carter asserts that the judgment was improperly rendered in favor of the Dayton Board of Education upon the basis of numerous findings which were clearly erroneous. Further, plaintiff contends that the magistrate erred in concluding that certain joint exhibits, which were the subject of stipulation and to which neither party objected, were unreliable and of no evidentiary value. Finally, plaintiff claims that the magistrate erred in applying the appropriate case law to the facts here with respect to requirements of proof of disparate treatment under Title VII. Specifically, plaintiff claims that defendants failed to rebut her prima facie case of sexual discrimination by sufficient evidence that the failure to promote her to the position of elementary

principal, and the promotion of men to that position instead, was based upon legitimate non-discriminatory reasons.

Our careful review of the record shows that a few of the extensive findings of fact may have uncertain support in the record. The record as a whole, however, supports the magistrate's finding that the decision not to promote the plaintiff was based upon legitimate, non-sexually discriminatory reasons. In particular, it appears that although plaintiff was educationally qualified for the post, Superintendent Maxwell did not have the same degree of confidence in her abilities as did Dr. Carle, whom he replaced in July, 1973. The record shows that this lack of confidence did not relate to plaintiff's sex; it fundamentally related to the parties' differing philosophical attitude toward the position as an educator and toward different policies instituted by Superintendent Maxwell upon taking office. This was particularly true with respect to plaintiff's attitude toward school discipline. Additionally, Maxwell quite evidently was concerned that plaintiff had at least some difficulty maintaining student discipline and getting along with other teachers, parents and students.

While plaintiff vigorously defends her record and asserts that any finding of comparative deficiencies on her part is clearly erroneous, we are unable to agree. It was not for the magistrate or for us to determine the merits of Superintendent Maxwell's claims. It is sufficient that these reasons, and not sexual discrimination, provided the basis for plaintiff's failure to be promoted.

The magistrate's decision to reject the stipulated statistical evidence was not based so much on the inaccuracy of the data as it was on the limited value of its use because of the manner in which it was presented. He found that the sample group contained in the data was

insufficient in number to enable any statistically reliable evaluation of the alleged discrimination. The magistrate also found that the data base was inappropriate. The exhibits sought to compare the number of women promoted to elementary principalships with the total number of women employed by the Board, rather than with the total number of women who met the objective qualifications for the position. The weight and credit to be given this evidence, as indeed with any other evidence in the case, is a matter for the finder of fact and is subject to the clearly erroneous rule. Plaintiff has not shown that the magistrate's decision on this matter was clearly erroneous. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed May 31, 1979)

No. C-3-77-438

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

IRIS CARTER,
Plaintiff,

vs.

DAYTON BOARD OF EDUCATION, *et al.*

JUDGMENT

This action came on for (hearing) before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing, and that the complaint herein is hereby DISMISSED.

JOHN D. LYTER
Clerk of Court
By: /s/ REBECCA E. ANDERSON
Deputy

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed May 31, 1979)

No. C-3-77-438

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IRIS CARTER,
Plaintiff,

vs.

DAYTON BOARD OF EDUCATION, *et al.*,
Defendant.

ORDER

This matter is before the Court pursuant to reference to the United States Magistrate as a special master pursuant to 28 U.S.C. §636(b)(2), Rule 53 of the Federal Rules of Civil Procedure, and §1.5(1) of Western Division Rule No. 1 in the United States District Court for the Southern District of Ohio. Pursuant to such reference the Magistrate held hearings at which evidence and testimony were presented and filed with this Court Findings of Fact and Recommendations for Disposition.

Rule 53(e)(2) contains the following:

> In an action to be tried without a jury, the court shall accept the master's findings of fact unless clearly erroneous.

The term "clearly erroneous" has been defined by the Supreme Court of the United States in *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948) as follows:

> A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

After a review of the comprehensive findings of the Magistrate, after review of the pleadings in this matter, and after hearing in open court, this Court does determine that the Findings of Fact are not clearly erroneous, and are hereby accepted.

Pursuant to the Recommendations of the Master, judgment is hereby entered in favor of the defendant.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
United States District Judge

NOTICE OF THE UNITED STATES DISTRICT COURT

(Filed February 14, 1979)

Case No. C-3-77-438

IN THE UNITED STATES DISTICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IRIS CARTER,
Plaintiff,

vs.

DAYTON BOARD OF EDUCATION,
et. al.,
Defendants.

NOTICE

Attached hereto is the Report and Recommended Decision of Honorable Robert A. Steinberg, United States Magistrate which was filed on February 14, 1979. Any party may object to the Magistrate's findings, recommendations and report within ten (10) days after being served with a copy thereof. Such parties shall file with the Clerk of Court, and serve on all parties, the Judge and the Magistrate, a written Motion to Review which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made along with a memorandum of law setting forth the basis for such objection. (Such parties shall file with the Clerk

a transcript of the specific portions of any evidentiary proceedings to which an objection is made.)

In the event a party files a Motion to Review the Magistrate's Findings, Recommendations and Report, all other parties shall respond to said Motion to Review within ten (10) days after being served with a copy thereof.

REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT

(Filed February 14, 1979)

Case No. C-3-77-438

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IRIS CARTER,
Plaintiff,

vs.

DAYTON BOARD OF EDUCATION,
et al.,
Defendants.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This case is before the Court after trial on the merits and extensive post-trial briefs filed by both parties. Plaintiff claims that, during the 1974-1975 school year, Defendants discriminated against her because of her sex by refusing to appoint her to the positions of principal and assistant principal and by demoting her to the position of

teacher. Plaintiff also alleges that Defendants maintained a salary system which resulted in unequal treatment of females. Plaintiff filed this case as a class action but later withdrew her class action claims. Defendants claim that there was no inequality in pay, that Plaintiff was not demoted as a result of sex discrimination and that Plaintiff was not denied the positions of principal and assistant principal as a result of sex discrimination. Defendants claim that Plaintiff was not promoted to principal because she was not as qualified for that position as other candidates.

During the trial, Plaintiff offered no evidence in support of her claims that females received unequal pay, that she was demoted as a result of sex discrimination, and that she was denied an assistant principalship as a result of sex discrimination. The only claim upon which Plaintiff offered evidence was her claim that she was denied a principalship because of sex discrimination.

FINDINGS OF FACT

1. Plaintiff, Iris Carter, is a Caucasian female who is presently a fifth grade teacher at Whittier Elementary School, Dayton, Ohio.

2. Plaintiff has a Bachelors Degree in Elementary Education from Ohio State University. She has a Masters Degree in Human Growth and Development with a minor in Montessori Education from Xavier University. In addition, she has engaged in graduate studies in the fields of Educational Administration and Clinical Psychology at the University of Dayton, Wright State University, the Gestault University of Cleveland and LaVerne College.

3. Plaintiff has a permanent teaching certificate, an elementary principal's certificate, an elementary supervisor's certificate, an educational administrative specialist

certificate and a superintendent's certificate. Plaintiff is therefore qualified to become an elementary school principal.

4. Plaintiff was first employed as an elementary school teacher by the Dayton Board of Education for the school years 1965-1966 and 1966-1967. Plaintiff thereafter resigned to accept a position as teacher in the West Carrollton school system for the 1967-1968 and the 1968-1969 school years.

5. In the 1969-1970 school year, Plaintiff returned to the Dayton school system as an assistant principal at Westwood Elementary School.[1] Plaintiff's duties included disciplinary responsibility for fourth through eighth grade female students and for the staff. At that time, Dr. Wayne Carle was superintendent of the Dayton Board of Education (hereinafter referred to as the Carle Administration).

6. In the 1970-1971 school year, Plaintiff was transferred to become a supervisor in the Curriculum Department because one of the three assistant principal positions at the Westwood Elementary School had been eliminated. As supervisor, Plaintiff was initially assigned seven schools to work with and later the number was increased to fifteen. Plaintiff's duties involved implementation of the Carle Administration's programs, including the Individually Guided Education Program (IGE). During the summer of 1971, Plaintiff was employed as principal at the summer

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1. Despite the fact that Plaintiff was immediately employed as an assistant principal upon her return to the Dayton school system in the fall of 1969, she has alleged both in her Complaint (pg. 5, ¶ 30) and in her Final Pretrial Order (pg. 2, ¶ IV.A.1) that she was discriminated against by not being promoted to assistant principal. Plaintiff received further assignments as assistant principal in later years, as reflected in the findings of fact, infra. During the years she was not assigned as assistant principal, she made no application for said position. These specious allegations reflect unfavorably upon the credibility of Plaintiff's case.

school at Huffman Elementary School for the purpose of training the principal and staff of Fairport Elementary School to implement the IGE Program that fall.

7. In the 1971-1972 school year, Plaintiff was assigned to the Fairport Elementary School as assistant principal responsible for implementing the IGE Program. At the conclusion of that school year, she was advised by her superior that she was being removed from her position and placed into the Curriculum Department. Plaintiff was informed that the reason for her transfer was "that there was [sic] some dissatisfied parents in the community with me who were politically aligned with the conservative SOS group and that it was for my well-being that I be removed from the building and placed into curriculum with supervisory staff again."

8. During the 1972-1973 school year, Plaintiff was coordinator for the Executive Teacher Program at the Westwood and Gardendale schools, working under Dr. Violet Strahler. In January 1973, the principal of Shiloh Elementary School underwent surgery and was absent on sick leave. Plaintiff was transferred to that school as assistant principal and worked there the remainder of that school year performing the duties of an acting principal. There were no other assistant principals at the Shiloh Elementary School at that time.

9. In July of 1973, a new administration under Superintendent John Maxwell assumed control of the Dayton Board of Education (hereinafter referred to as the Maxwell Administration). At the time of the trial, Mr. Maxwell had been in the Dayton school system for 36 years. He holds a life certificate for secondary school principal, professional certificate for superintendent, elementary principal certificate, and special certificates for physical education and industrial art. The Maxwell Administration em-

phasized an approach to education which was different from that of the Carle Administration. Mr. Maxwell referred to it as the "Back to Basics" program.

10. The administrative promotions for the 1973-1974 school year were determined by the Carle Administration and, for the most part, were implemented by the new Maxwell Administration.

11. Plaintiff accepted a contract as supervisor in the Curriculum Department for the 1973-1974 school year. However, Plaintiff was assigned the non-supervisory job of unit facilitator, but was paid at the highest level possible in the Curriculum Department. This came about because Plaintiff had been performing as an acting principal under the Administration Department while technically employed in the Curriculum Department. Therefore, each department lost track of Plaintiff and believed her to be in the employ of the other department. As a result, all of the positions in the Curriculum Department had been filled by the time Plaintiff accepted her contract. This mistake was legitimate and unintentional and did not prejudice Plaintiff financially. Plaintiff's duties as a unit facilitator included assisting teachers with mathematics and reading programs and assisting principals in curriculum matters.

12. From the 1969-1970 school year through June 1973 Plaintiff was considered by the Carle Administration for each opening in the position of elementary school principal. Each year, the Carle Administration appointed individuals to such openings whom they believed to be more qualified than Plaintiff.

13. In March of 1974, Plaintiff applied for a principalship at the elementary level for the 1974-1975 school year. Her name was placed on an eligibility list along with the names of 61 other individuals who had applied for the same position (Joint Exhibit 14).

14. Due to cutbacks imposed by the Maxwell Administration, Plaintiff's position as unit facilitator was eliminated for the 1974-1975 year and she was offered a contract as teacher, which would result in a $5,000.00 paycut. In April 1974, Plaintiff wrote to Defendant Maxwell concerning her problem. She explained the mix-up which had resulted in her being given a position as unit facilitator and her desire not to experience a paycut. She stated that she wished to become a principal, but since it was unlikely that a principalship would be open for the next year, she would like to remain as a supervisor in the Instruction Department.

15. In June Plaintiff met with Mr. Maxwell for an interview concerning the position of principal. During the interview, Mr. Maxwell discussed with Plaintiff her philosophy regarding discipline and particularly the paddling of students. Mrs. Carter's philosophy differed from that of Mr. Maxwell on the subject of discipline and particularly paddling.

16. In July of 1974, Plaintiff filed complaints with the Ohio Civil Rights Commission and the EEOC regarding her inability to advance to a principalship. In her EEOC complaint, Plaintiff alleged that on or about July 18, 1974, the Dayton Board of Education filled two vacant principal positions with males. She further alleged that she was given a classroom teacher contract at several thousand dollars a year less than she had been earning. She concluded that the Dayton Board of Education was discriminating against her because of her sex. Conciliation efforts by those agencies were unsuccessful. On September 23, 1977, Plaintiff was issued a right to sue letter, which formed the jurisdictional basis for filing the complaint in this case.

17. In the 1974-1975 school year, Plaintiff was not demoted to a teacher's position. Rather, she was employed as a school services advisor (SSA) at the Valerie Elementary School performing the same duties as she had the previous year. All former unit facilitators, both male and female, were given positions as SSA's after the unit facilitators' positions were eliminated.[2] At the conclusion for the school year her principal, Alfred Fields, furnished an evaluation of Plaintiff's performance to the Board of Education and recommended that she be considered for a position such as supervisor or principal.

18. In the 1975-1976 school year, Plaintiff was assigned the same duties at Valerie School. In May of 1976, Plaintiff applied for an elementary school principalship and was placed on the eligibility list. She was not selected for the position.

19. In the 1976-1977 school year, Plaintiff was again assigned as an SSA at Meadowdale Elementary School, which already had an assistant principal and a principal. In March of 1977, Plaintiff again applied for a position as Elementary school principal for the following year.

20. In the 1977-1978 school year, all of the SSA positions were eliminated due to "budget cutbacks". Plaintiff was assigned to Whittier Elementary School as a fifth

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2. Although the Board of Education did advise Plaintiff, by letter dated April 26, 1974, that she would be demoted to a teaching position for the 1974-1975 school year, Dayton Board of Education records reflect that Plaintiff was assigned as a school services advisor. (Joint Exhibit XLIX). Plaintiff herself testified that she was employed as a school services advisor at Valerie Elementary School for the 1974-1975 school year. Nevertheless, in her complaint filed December 23, 1977, Plaintiff states that, for the 1974-1975 school year, "Plaintiff was demoted and assigned a classroom teaching job". In the Final Pretrial Order, Plaintiff reiterates this allegation (p. 2, ¶ IV.A.1.(2)). This specious allegation reflects unfavorably upon the credibility of Plaintiff's case.

rade teacher.[3] She was interviewed for administrative positions that year but not appointed to any of them.

21. During the 1974-1975 school year, and in later years, the Dayton schools had been party to a U. S. Department of Health, Education and Welfare staff balance order, which required that the staffs of individual schools must be balanced as to their racial composition. Plaintiff testified that two of her transfers resulted from a desire of the Maxwell Administration to equalize the racial balance in the Dayton school system.

22. Plaintiff's personnel record does not contain unfavorable evaluations of her job performance. In the latest evaluation prior to the 1974-1975 school year, Plaintiff was evaluated at the second highest performance level, having been found to "meet expectations".

23. The testimony is in conflict as to the number of openings for elementary school principalship and the identity of those selected to fill said openings during the school years 1974-1975 through 1976-1977. This is due in part to the lack of foundation evidence introduced to establish the accuracy of the statistical exhibits.[4] However, as best as can be determined from the information available, not more than four principalships were filled with new applicants during the aforementioned time period. Other principalships were open, but were filled by principals transferring from schools which had been closed. Only one new applicant was appointed elementary school principal for the 1974-1975 school year. The statistical evidence also appears to indicate that no women have been appointed

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3. No additional evidence was offered regarding this event, nor did Plaintiff claim that the demotion was discriminatory.

4. See opinion, pp. 16-23.

as elementary school principal by the Dayton Board of Education from 1972 to the present time.[5]

24. During the 1972-1973 school year, a women's rights committee was formed by the Carle Administration to examine "sex bias and discrimination which might exist in Dayton schools". The committee issued two reports, Joint Exhibits XXXVII and XXXVIII. The Carle Administration did not implement any of the recommendations contained in either of the reports. The issuance of the final report in July 1973 completed the committee's task. However, the committee chairperson, Joyce Kaser, wrote to incoming Superintendent Maxwell and requested that he continue the committee. Mr. Maxwell preferred to form his own committee and did so.

25. The Maxwell Administration's women's rights committee for the 1973-1974 school year included Jeanette Youngerman as "Chairer", Kathleen Armstrong, Laprecious Branche, James Eschbach, Carol Foreman, Ed Jones, Tommie Jones, Mrs. B. Kiser, Mary Lower, Jeana Ruzic, Jo Stewart, Ruth Storck, and Daisy Torrance.

26. On April 15, 1974, the women's rights committee issued a report and requested that the recommendations contained in the report be implemented immediately. One of those recommendations was that "the persons making selections (for administrative positions) actively seek qualified persons leading toward a more equitable sex balance". It was recommended that the Staff Development Department issue a "letter of concern" to all professional staff members indicating the need for women qualified in educational administration. A substantial portion of the report was devoted to women's rights in athletics. A specific recommendation was that qualified women be recruited to fill coaching positions. The Maxwell Admin-

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5. See opinion, p. 23.

istration implemented all the recommendations of the women's rights committee, including the appointment of the first woman high school basketball coach in the State of Ohio.

27. The Maxwell Administration promoted the following women to the following administrative positions:[6]

Name	Position
Doris Brown	Principal
Serepta Anderson	Assistant Principal
Darlene Bandrofchak	Assistant Principal
Jean Booker	Principal
Jean Hutson	Assistant Principal
Jean Hobson	Assistant Principal
Sallee Gregory	Charge of Teacher Corp.
Mary Hiatt	Assistant Principal
Susan Kurczewski	Public Information Officer
Alice Leahy	Assistant Principal
Elizabeth Vincent	Assistant Principal
Brenda Lee	Affirmative Action Officer
Mildred McElroy	Assistant Principal
Mildred McGill	Assistant Principal
Alberta Minor	Title VII Coordinator
Mildred Patterson	Director of Title VII Programs
Ruth Richardson	Guidance Counselor
Helen Moorman	Assistant Principal
Katherine Davis	Affirmative Action Director
Elizabeth Davis	Assistant Principal
Eloise Swann	Title VII Coordinator
Daisy Torrance	Supervisor of Language Arts
Lucinda Adams	Supervisor of Girls Phys. Ed.
Barbara Mims	Practical Nurse Director
Nancy Thickel	Public Information Officer
Marge Schemmel	Supervisor of Nurses
Doris Black	Coach of Boys Basketball Team

6. Spelling of names as per official transcript.

28. Each year the Maxwell Administration posted openings in administrative positions, including principalships, and the names of those applying for the opening were placed on a list. The applicants were screened by an administrative committee and a certain number were chosen for interviews. Each year in which Plaintiff applied for the position of principal, she did not place among those at the top of the list. In some years she was not among the final candidates selected for interviews.

29. Mr. Maxwell received the list of final candidates from the Assistant Superintendent in Charge of Administration, after determination was made that all persons on the list were qualified. Mr. Maxwell then checked the personnel files of those individuals on the list and contacted the principal at the school where each individual had been employed to obtain a recommendation. He also sought recommendations from the community where the individual had worked. He discussed each promotion at his cabinet meeting.

30. In determining who would be selected for a principalship, Mr. Maxwell considered a number of factors including leadership, training, ability to get along with parents and teachers, knowledge of the curriculum, ability to discipline both students and staff, ability to control finances in a particular school, and ability to supervise extracurricular activities. He also attempted to match the individual characteristics of the person to those of the school and the community where the opening existed. Detailed descriptions existed for administrative positions including supervisor, elementary assistant principal and elementary principal. There is nothing in the descriptions themselves which can be inferred to be in any way discriminatory.

31. Two years ago the process for selection of individuals to fill administrative positions changed. The best qualified job applicants were interviewed by four to six administrators who then referred the best two or three individuals to Superintendent Maxwell for interview. During the last two years, Plaintiff was eliminated in the screening process and her name was not on the list submitted to Superintendent Maxwell.

32. Since the time Mr. Maxwell became superintendent, his administration has had to close ten school buildings. Each time this occurred, a principal or assistant principal would be transferred in order to provide them with employment. A number of open principalships were filled by principals transferred from closed schools.

33. The individuals selected for new elementary school principalships for the 1974-1975 through 1976-1977 school years were, under the legitimate criteria utilized by the Maxwell Administration, well-qualified for the positions.

OPINION

Plaintiff has the burden of establishing by a preponderance of the evidence that she was discriminated against because of her sex. Plaintiff may establish a prima facie case by showing:

(a) that she is a female;

(b) that she applied for and was qualified for a job for which the employer was seeking applicants;

(c) that she was not selected by the employer; and

(d) that the position remained open and was ultimately filled by a person of Plaintiff's qualifications or of lesser qualifications.

McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); *Furnco Constr. Corp. v. Waters*, ... U.S. ....., 46 L.E. 4966 (1978).

The establishment of a prima facie case of disparate treatment raises an inference of discriminatory animus on the part of Defendants because it is presumed that Defendants' acts are more likely than not based on the consideration of impermissible factors. *Furnco Constr. Corp. v. Waters, supra.*

In connection with establishing her prima facie case, Plaintiff is permitted to introduce evidence of possible discrimination taking place prior to, and subsequent to, the time period in question, in order to support the inference that such alleged unlawful conduct continued through the pertinent time period. *Hazelwood School District v. United States*, 433 U.S. 299 (1977); Fed. R. Evid. 406.

Once Plaintiff has established a prima facie case, the burden of going forward shifts to Defendants to articulate some legitimate, non-discriminatory reason for their actions. *Furnco Constr. Corp. v. Waters, supra.* Once such a reason is articulated, Defendants have no further burden. The burden of going forward then shifts back to Plaintiff to establish that the reason given by Defendants is pretextual. The ultimate burden of persuasion on the issue of discrimination always remains with Plaintiff, who must convince the Court by a preponderance of the evidence that she has been the victim of discrimination. *Board of Trustees v. Sweeney*, ... U.S. ....., 47 L.W. 3015 (1978).

Although the credibility of Plaintiff's case-in-chief suffered by her failure to offer evidence regarding three of her four discrimination allegations, and by the fact that

two of the allegations are obviously inaccurate,[7] we find that Plaintiff did make out a prima facie case of discrimination as follows:

Plaintiff's evidence established (1) that she was a female; (2) that, in 1974, she applied for and was qualified for the position of elementary school principal, a job for which Defendants were seeking applicants; (3) that she was not selected for said position; and (4) that the position remained open and was ultimately filled by a person of Plaintiff's qualifications or of lesser qualifications.[8] Thus, Plaintiff established a prima facie case as envisioned by the Supreme Court in the *McDonnell-Douglas, Furnco* and *Sweeney* cases by introducing evidence sufficient to shift the burden of going forward to Defendants to articulate the reason for their actions.

Defendants' Burden
of Going Forward

Defendants, both by the testimony they introduced in their case-in-chief, and by the testimony of Plaintiff's own witnesses, met their burden of articulating a legitimate, non-discrimatory reason for failing to promote Plaintiff to elementary school principal for the 1974-1975 year.

Only one new principal, John Pontisso, was appointed by the Maxwell Administration for the 1974-1975 school year in either the elementary or secondary schools. Mr. Pontisso had been an assistant principal for seven years at the time he was appointed principal at Belle Haven Elementary School. He was assistant principal at Belle

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7. See page 1 and footnotes 1 and 2, pp. 2 and 6, supra.

8. At trial, Defendants conceded that Plaintiff had established this element of her case because she held an elementary principal's certificate. For the purpose of this opinion, the concession will be accepted without further examination.

Haven during the three years immediately preceding his appointment. Mr. Maxwell had been principal at Meadowdale High School and had observed students who had originally attended Belle Haven during the time Mr. Pontisso was assistant principal. Mr. Maxwell also had learned from parents of the students at Belle Haven that they were impressed by the way Mr. Pontisso handled students. Mr. Maxwell was also impressed with the manner in which Mr. Pontisso handled discipline problems at the school. Mr. Maxwell stated that he did not believe that Mr. Pontisso had any weak points.

On the other hand, there were reasons why Plaintiff was not considered a leading candidate. Plaintiff had extensive experience with implementing new teaching programs, while Mr. Maxwell favored a "Back to Basics" system. Mr. Maxwell felt that he and Plaintiff differed on their philosophy concerning discipline and the paddling of students. He had been informed that Dr. Graham had taken unfavorable information out of her file. He was also informed that she had a number of problems working at the Fairport school and that the principal, Mrs. Wellesley, had asked that she be transferred. He was told by Mrs. Bullock, principal of Shiloh Elementary School that, when Plaintiff was assistant principal there, she had difficulty disciplining the students. He felt Plaintiff had "very fine curriculum ability but very poor ability to handle students". He believed she delegated too many tasks to others. Furthermore, Mrs. Carter did not have the familiarity with the Belle Haven School and staff that Mr. Pontisso did. Thus, Defendants met their burden of articulating a legitimate reason for the appointment of Mr. Pontisso for the 1974-1975 school year.

The evidence conflicts as to the number and identity of persons newly appointed to elementary school principal-

ships during the next two years.[9] Although the Defendants did not have the burden of articulating legitimate reasons for appointments during these years, they undertook to do so. We find that the reasons given with respect to the appointment of Mr. Nilsen and Mr. Staten were legitimate and not related to discrimination.

With respect to John Hertvik, who may have been appointed in the 1975-1976 school year, Defendants offered no testimony because they contended no appointment was made that year. However, Mr. Hertvik's personnel file[10] reflects that he has a Bachelor of Science Degree from the University of Dayton and a Masters Degree in Education from Wright State University. Mr. Hertvik had been an assistant principal for three years at MacFarlane Middle School. His performance appraisal for the 1973-1974 school year was higher than that of Plaintiff's. Mr. Hertvik was rated to "exceed expectations" in each area of the appraisal, which was prepared by his principal, Jewell T. Bates. Therefore, if Mr. Hertvik was in fact appointed principal in 1975, the documentary evidence shows him to have been well qualified for that position.

Plaintiff's Burden to Prove by Preponderance of the Evidence That Defendants' Reasons Were Pretextual and That She Was the Victim of Sexual Discrimination

Plaintiff offered no evidence at trial to rebut Defendants' case-in-chief. Rather, Plaintiff relied on the evidence already presented during her case-in-chief. In particular, Plaintiff offered no affirmative evidence to attempt

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9. See opinion, page 22. As best as can be determined not more than three new applicants were promoted to elementary school principalships for the 1975-1976 and 1976-1977 school year.

10. Joint Exhibit L.

to establish that Mr. Pontisso was less qualified for the position of principal than she. Nor did Plaintiff offer affirmative evidence regarding the lack of qualifications of other individuals promoted to the position of principal. Plaintiff offered no evidence to establish that the reasons given by Mr. Maxwell for not appointing her were pretextual.

In order to establish her burden of persuasion, Plaintiff relied heavily upon the statistical evidence introduced at trial. We do not find the statistical evidence relied upon by Plaintiff to be sufficient to carry her burden of persuasion by a preponderance of the evidence for the following reasons.

Reliability of the Statistical Evidence

Statistical analyses may serve an important role in cases in which the existence of discrimination is a disputed issue. *Teamsters v. United States,* 431 U.S. 324 (1977). Discrimination is seldom proven by direct evidence and is most often proven by reasonable inferences to be drawn from the facts of the case, including statistical analyses. In many cases the only available avenue of proof is the use of statistics to uncover clandestine and covert discrimination by an employer. *United States v. Iron-Workers Local 86,* 443 F.2d 544, 551 (9th Cir. 1971). However, a word of a caution is necessary when attempting to interpret statistics:

> We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances. *Teamsters v. United States* at 340, *supra.*

In order for statistical data to be meaningful, a proper and logical analysis must be made. In the instant case, Plaintiff has urged that a comparison of the relative percentages of males and females in the total work force of the Dayton Board of Education to the relative percentages of males and females appointed to elementary principalships from the period October 1973 to October 1977, shows a gross disparity from which discrimination should be inferred. Such a conclusion is the result of a fundamental misconception of the role of statistics in employment discrimination cases. The "total employee work force" may contain substantial numbers of female employees in such positions as cafeteria workers, janitorial staff, etc., none of whom are qualified for appointment as elementary school principal. Inclusion of these females in the statistical analysis could lead to an inaccurate result.

The appropriate comparison is one between the sexual composition of the *qualified applicants* for elementary principalship and the sexual composition of the newly appointed elementary school principals during the relevant time period. See, *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977). Plaintiff has neither attempted to make the above comparison, nor has she submitted evidence from which such comparison could be made. (See p. 23, infra).

Furthermore, the reliability of the statistical information contained in the Joint Exhibits has not been established. At trial, the parties agreed to the authenticity of the Joint Exhibits containing documents of the Dayton Board of Education.[11] Documents containing statistical in-

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11. Joint Exhibits XXXII, XXXIV, XXXVII, XXXVIII, and Defendants Exhibits A and B are primarily relied upon by the parties as containing the statistical information to support their theories.

formation relied upon by both parties were offered into evidence as "business records" and no objection was made to their admissibility (Tr. 217-282). The parties did not stipulate the accuracy of the information contained within the records.

In order to qualify as a business record, and thus be admissible as an exception to the hearsay rule, the document must be:

> a memorandum, report, record, or data compilation, in any form, of acts, of events, conditions, opinions, or diagnoses, *made at or near the time by or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation,* all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. Fed. R. Evid. 803(6) (emphasis added).

In order for a document to come within the business record exception to the hearsay rule, it must be made in the systematic conduct of a business, made as a matter of routine, and made to reflect regular business transactions. *Palmer v. Hoffman,* 318 U.S. 109 (1943). It is the regularity and routine of keeping the records for the purpose of operating the business which tends to establish the trustworthiness of the records. *United States v. Graham,* 391 F.2d 439 (6th Cir. 1968). No testimony was introduced to establish the aforementioned facts concerning the Joint Exhibits in question. In fact, from the evidence available, and from an examination of the exhibits themselves, it appears that each of the statistical documents were prepared in the course of an unusual activity under-

taken for one purpose only, as opposed to a regularly conducted business activity.

Testimony must also be given by a custodian adequately authenticating the record's accuracy and explaining the efforts employed to ensure this accuracy. No such testimony was presented in this case. *United States v. Blake*, 488 F.2d 101 (5th Cir. 1973). Furthermore, no evidence was introduced to establish that the records were made at or near the time of the events described in the record. To the contrary, it appears in each case that the record was not in fact made at the time of the events therein described, but at a much later time.

It is the circumstances under which the records are recorded, kept, maintained and used that establish the reliability essential to the law's conclusion that, without any independent recollection by those who made the succession of entries, they are reliable, because the business itself relies on them for important business judgments. *Bridger v. Union Railway Company*, 355 F.2d 382 (6th Cir. 1966). Evidence of such circumstances was never introduced in this case.

The existence of the documents in the file of the company does not, without more, render it admissible as a business record. *Standard Oil Co. of California v. Moore*, 251 F.2d 188 (9th Cir. 1957). Nor do the documents meet the exception for public records and reports under Fed. R. Evid. 803(8).[12]

The minimal evidence available concerning the documents indicates they are not business records, but are summaries of other records of the Dayton Board of Education, and that they were prepared for a specific purpose. The

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12. The only Joint Exhibits offered as public records were Exhibits XL-XLIII, minutes of the Board of Education.

women's rights committees' reports[13] were prepared by the members of that committee for the purpose of expanding the rights of women in the Dayton Board of Education. The analyses of appointments of individuals to the positions of principal and assistant principal since 1972[14] were apparently prepared for study by officials of the Board of Education to analyze the racial and sexual composition of the administrative staff. The Chronological History of Principal and Assistant Principal Appointments[15] were prepared for the purpose of litigating this case.

The women's rights committees' reports were identified by the author, Joyce Kaser. Ms. Kaser was not asked how the statistical information and the subjective conclusions contained in the reports were compiled, with the exception of the statistics contained on page 8, ¶ 5 of Joint Exhibit XXXVIII. With respect to the latter, she stated "all the employment data I obtained from the Personnel Department through Dr. Thomas Graham". Dr. Thomas Graham was called as a witness for Plaintiff, but was not questioned concerning the two women's rights committee reports. Both reports contain conclusions which are highly subjective in nature, but no evidence was introduced as to what information these conclusions were based upon.

With regard to the exhibits analyzing the sexual and racial composition of principals and assistant principals appointed since June 1972, the most extensive examination on this subject was that of Mr. William Harrison, with respect to Joint Exhibit XXXIV. Mr. Harrison testified that he was familiar with the exhibit and stated that "this was prepared, I am of the opinion, by a secretary in my

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13. Joint Exhibits XXXVII and XXXVIII.
14. Joint Exhibits XXXII and XXXIV.
15. Defendants' Exhibits A and B.

office and one in Mr. Weinman's office. I wanted to be able to use this, as you said, make an analysis of both race and sex as to the changes in our administrative staffs." Mr. Harrison was never questioned as to the source of the information contained in the exhibits, nor as to the manner of its compilation. In fact, in his testimony, he questioned the accuracy of the information contained therein.

Defendants Exhibits A and B were identified by Mr. Paul Ressler as "statistical figures that were prepared several weeks ago at my direction by Mrs. Balas, my secretary". It was further established that the exhibits were prepared from records maintained in Mr. Ressler's office at the request of Defendants' attorney. However, the "records" referred to were never identified. Nor did Mr. Ressler explain the manner by which the information contained in the records was summarized by his secretary. Documents which are prepared for use essentially in litigating a claim are particularly suspect. *Trout v. Pennsylvania Railroad Co.*, 300 F.2d 826, 830 (3rd Cir. 1962).

All of the above-described documents are clearly summaries of other records of the Dayton Board of Education. The use of summaries of voluminous materials in cases where the original evidence cannot be conveniently introduced is a matter within the discretion of the trial court. See, Fed. R. Evid. 1006. Certain criteria have evolved to guide a court in exercising its discretion. A proper foundation must be laid with reference to the admissibility of the originals. Furthermore, it must be shown that the summation accurately summarizes the materials involved by not referring to information not contained in the original. *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3rd Cir. 1961). Because no testimony was introduced concerning the nature of the source from which the information was gathered for these reports, nor the manner

in which they were compiled, they do not have any evidentiary value. *Bogacki v. American Machine & Foundry Company*, 417 F.2d 400, 407-408 (3rd Cir. 1969).

During trial, the Magistrate specifically indicated to the parties that, although the Joint Exhibits would be admitted because no objection was made, there was a question as to whether any evidence had been introduced to explain the documents.[16]

In addition to the failure of the parties to establish the reliability of the information contained in the aforementioned exhibits, examination of the exhibits themselves raises a question as to the reliability of the information contained therein. A careful reading of the exhibits reflects that the statistical conclusions contained in them are inconsistent and contradictory.

For example, Defendants' Exhibit A and Joint Exhibit XXXII indicate that no new promotions were made to principalships during the 1975-1976 school year. However, Joint Exhibits XXXIV and L indicate that John Hertvik was appointed principal at Grant Elementary School for that year. Defendants have taken the position that no new promotions to an elementary school principalship were made for the 1975-1976 school year, while Plaintiff claims that John Hertvik was appointed to such position.

Another example involves Defendants' Exhibit A, which indicates that three new appointments were made to elementary school principalships for the 1976-1977 school year. However, Joint Exhibits XXXII and XXXIV indicate that only two new principal appointments were made that year in elementary schools.

This is not a matter of the Court attempting to determine the credibility of witnesses. Rather, this is a mat-

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16. See Tr. 215 through 219.

ter of irresolvable conflicts in documents, which emphasize the unreliability of the documents. Where Plaintiff relies upon the information contained in said documents to carry her burden of persuasion, Plaintiff is obliged to satisfy the Court that such information is reliable. Plaintiff has not met this obligation.

The statistical information contained in the aforementioned exhibits must be rejected for yet another reason. Assuming the statistics to be reliable, they reflect that only four persons were newly promoted to the position of elementary school principal during the school years 1974-1975 through 1976-1977.[17] Evidence has not been introduced to establish either the number of persons applying for such positions each year, or the sexual composition of the applicants.[18] We do not feel that any reliable conclusion can be drawn from the apparent fact that four males and no females were appointed to the position of elementary school principal over a three year period. Statistical evidence derived from an extremely small universe, as in the present case, has little if any predictive value and should be disregarded. *Mayor v. Educational Equality League*, 415 U.S. 605 (1974); *Harper v. Trans World Airlines, Inc.*, 525 F.2d 409 (8th Cir. 1975).[19]

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17. This determination is a hypothetical one, based upon the highest number of appointments which were apparently made. It is impossible to make an accurate determination due to the unreliability of the statistical evidence and the direct conflicts therein.

18. Joint Exhibit XXXIII is entitled "List of People Who Applied for Principalships Since 1972". No evidence was introduced to either authenticate or explain the information contained in this exhibit. The exhibit is not self-explanatory.

19. Plaintiff has also alleged that no females have been appointed to the position of elementary school principal since 1972 and has relied on the statistical exhibits to support that claim. However, due to the unreliability of the statistical evidence, this fact is not altogether clear. Furthermore, there is no reliable evidence from which to determine the size of the statistical sample of those actually appointed to elementary principalships since 1972 in order to determine if it is meaningful.

Non-Statistical Evidence of Discrimination

Plaintiff offered no evidence tending to establish that those individuals promoted to an elementary school principalship were less qualified than she. Rather, Plaintiff relied on her allegation that Defendants failed to carry their burden of going forward to explain a legitimate reason for the promotion of those individuals. The evidence establishes that those promoted were well-qualified for the position, and that Plaintiff also was well-qualified for the position.

Although the relative qualifications of individuals for appointment to a position are considered by the Court in determining whether Plaintiff has established a prima facie case, it is not the function of the Court to determine ultimately which individual was most qualified for the position during each year in question. To do so would simply substitute the judgment of the Court for the judgment of the Board of Education, a result which would not be proper.[20] See, *Flucker v. Fox Chapel School District*, ... F.Supp. ....., 18 FEP 1509 (W.D. Pa. 1978).

In the selection of an elementary school principal, as with any other professional position, the considerations over and above the minimum qualifications must be largely subjective. An applicant's academic accomplishments are not the sole criteria for judgment. The fact that such considerations are subjective results in a closer scrutiny of them by the courts to determine whether there is any evidence of discriminatory animus. Where no such evidence is found, there is no basis for a finding that discrimination existed simply because subjective criteria were

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20. Neither the Constitution nor the Civil Rights Act of 1964 is a guarantee against incorrect or ill-advised personnel decisions. *Bishop v. Wood*, 426 U.S. 341, 350 (1976).

considered in making the decision. *Julian v. City of Knoxville,* 458 F.Supp. 16 (E.D. Tenn. 1978). See also *Senter v. General Motors Corp.,* 532 F.2d 511 (6th Cir. 1976), *cert. den.* 429 U.S. 870.

The evidence in this case established that, for the 1974-1975 school year, the decision to promote an individual other than Plaintiff to the position of elementary school principal was entirely legitimate and non-discriminatory. The evidence of Defendants' actions in prior years and subsequent years did not tend to establish a discriminatory motive on the part of Defendants. In each of those years Plaintiff was fairly considered for the position in question, but was rejected in favor of candidates whom the Maxwell Administration believed to be better qualified for bona fide, non-discriminatory reasons, as articulated during the trial.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and over the subject matter of this case, in accordance with 42 U.S.C. § 2000e, et seq. All appropriate jurisdictional prerequisites have been met by Plaintiff.

2. Title 42 U.S.C. § 2000e, et seq. prohibits discrimination against Plaintiff with respect to compensation, terms, conditions or privileges of employment because of Plaintiff's sex. The statute also proscribes the denial to Plaintiff of an equal opportunity to qualify for promotions.

3. Plaintiff claims that, during the 1974-1975 school year, Defendants discriminated against her because of her sex by refusing to appoint her to the positions of principal and assistant principal, by demoting her to the position of teacher, and by maintaining a salary system which resulted in unequal treatment of females. At trial, the only claim upon which Plaintiff offered evidence was her claim that

she was denied a principalship because of sex discrimination.

4. Plaintiff has introduced sufficient evidence to establish a prima facie case from which an inference of sexual discrimination may be drawn.

5. Defendants have met their burden of going forward by articulating legitimate, non-discriminatory reasons for not promoting Plaintiff to the position of elementary school principal during the 1974-1975 school year.

6. The statistical evidence upon which Plaintiff relies has not been shown, under appropriate legal standards, to be sufficiently reliable to form a basis for any findings of fact.

7. Assuming, arguendo, that the statistical evidence is reliable enough to support factual findings, the statistical sample from which Plaintiff seeks to infer discrimination is extremely small and has little, if any, predictive value. Furthermore, Plaintiff's analysis of the statistical data is not a valid one.

8. Plaintiff has failed to meet her burden of persuading the Court, by a preponderance of the evidence, that Defendants refused to promote her to an elementary school principalship because of her sex.

RECOMMENDED DECISION

IT IS THEREFORE RECOMMENDED THAT:

Plaintiff Iris Carter take nothing upon her Complaint and that judgment be entered in favor of the Defendants, John Maxwell and the Dayton Board of Education.

/s/ ROBERT A. STEINBERG
United States Magistrate

Date: February 14, 1979

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed June 21, 1978)

Civil No. C-3-77-438

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IRIS CARTER,
Plaintiff,

v.

DAYTON BOARD OF EDUCATION, *et al.*,
Defendants.

ORDER

This matter is before the Court upon defendants' motion pursuant to Rules 12(b)(1) and 12(b)(6), Fed. R. Civ. P., to dismiss various allegations of plaintiff's complaint.

I

Defendants assert that 20 U.S.C. §1681, upon which plaintiff has invoked jurisdiction in Count II of the complaint, does not create a private right of action for redress of employment discrimination. We agree.

In *Cannon v. University of Chicago*, 559 F.2d 1063 (7th Cir. 1976), the Seventh Circuit reached this conclusion after an extensive examination of the statute and legislative history. Judge Porter of this Court rendered a similar

decision in *Leake v. University of Cincinnati*, 14 F.E.P. Cases 1 (No. C-1-76-315, S.D. Ohio, September 16, 1976). Plaintiff has failed to adequately distinguish these cases from the instant action, and has provided no persuasive precedent in support of a contrary conclusion.

II

Defendants further assert that plaintiff's claims against Defendant Maxwell are barred by his immunity from liability for exercise of discretionary official acts. This assertion is without merit. It is clear from the complaint and plaintiff's memorandum that defendant Maxwell has not been sued individually, but only in his official capacity.

III

Since plaintiff has dismissed her class action allegations, defendants' motion in this regard is now moot.

IV

Defendants' final assertion is that plaintiff's equal pay allegations are "false and erroneous". This raises an essentially factual issue which the Court is unwilling to dispose of upon mere motion and affidavits.

Accordingly, defendants' motion to dismiss Count II of plaintiff's complaint is hereby GRANTED; defendants' motion to dismiss plaintiff's claims against defendant Maxwell is hereby DENIED; defendants' motion to dismiss plaintiff's equal pay allegations is hereby DENIED; defendants' motion to dismiss the class action allegations is MOOT. Count II of plaintiff's complaint is hereby DISMISSED.

It is so ORDERED.

/s/ CARL B. RUBIN
United States District Judge